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C O N F I D E N T I A L SECTION 01 OF 02 KABUL 003485

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SUBJECT: ABDULLAH'S WITHDRAWAL: PRELIMINARY LEGAL ANALYSIS

Classified By: PolCounselor Annie Pforzheimer Reasons 1.4 (b), (d)

11. (C) Summary: Following Dr. Abdullah Abdullah's November 1 speech withdrawing from the Presidential election, there are legal questions that must be answered in coming days. The ECC's Legal Advisor, Peter Lepsch, provided his preliminary analysis of the options under the Afghan Constitution and the 2005 Electoral Law. End Summary.

Afghan Law

12. (U) Article 61 of the Constitution prevents anyone but Abdullah and Karzai from running in the second round. It states clearly that, in the second round, "only the two candidates with the highest number of votes will participate." There does not appear to be any room for a legal challenge by Bashardost following Abdullah,s withdrawal.

13. (U) Article 37 (2) of the 2005 Electoral Law provides for a candidate to withdraw "after the end of the candidate nomination process." One legal argument is that the candidate nomination period took place before August 20. Another tenable legal view is that the nomination period for the second round run-off was the first round itself. In either case, the required nomination process has passed so a candidate can withdraw legally. In this event, according to Article 37 (2) &the votes cast in his or her favour shall not have any effect on the counting process.⁸

IEC Standard Operating Procedure

14. (C) The question arises about whether Abdullah can withdraw simply by declaring it in the media. In the first round, when candidates withdrew in the media but did not formally withdraw with the IEC, the IEC refused to accept that the candidate had actually withdrawn. They instead counted the votes for those candidates as &invalid⁸ following the election. This would leave the IEC procedural grounds to refuse to accept Dr. Abdullah,s withdrawal and continue with an election between both candidates, simply declaring all votes for Dr. Abdullah &invalid⁸ during the counting process.

15. (U) In his press conference today Abdullah was asked whether or not he had withdrawn formally via the IEC. He said "they can consider my withdrawal to be formal" but that he had severed all ties with the IEC. Poloff then spoke with Dr. Abdullah,s Special Assistant, Omar Ghafoorzai, who confirmed that with the "lack of professionalism" at the IEC there is no remaining relationship between the IEC and their campaign and they are thus not planning any formal withdrawal through IEC channels. The press reports that Dr. Najafi, Chief Electoral Officer of Afghanistan, said Dr. Abdullah cannot withdraw because the ballots are already printed and "the time for their withdrawal is over."

¶6. (C) If the IEC eventually opts to accept Dr. Abdullah's withdrawal from the election, perhaps if Dr. Abdullah's campaign submits something in writing to the IEC, there are two legally defensible tracks that can be taken under Afghan Law:

--The "Civil Law" approach would rule that having an election with only one candidate would be senseless. The remaining candidate in the race should be declared the winner.

--The "Common Law" approach would rule that no elected official can hold office without actually having been elected. Any official who holds an elected position must therefore win at least one vote from the electorate.

Possible Next Steps

¶7. (C) In anticipation of Dr. Abdullah's withdrawal speech, Lesch said that the ECC spoke with Zakria Barakzai of the IEC the morning of November 1 and explained to him that the IEC has the mandate to rule on the legal implications of Abdullah's withdrawal. The ECC left that meeting with the impression that Barakzai was receptive to their message of the need for IEC leadership. However, later that day, after the speech, Barakzai told Poloff in a phone conversation that the IEC would decide on the morning of November 2 about two possible courses of action: 1) pushing the decision to the Supreme Court or 2) declaring Karzai the winner.

¶8. (C) Comment: Afghanistan has traditionally hewn more

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toward civil law but as this will be a political decision, there is no guarantee that they will keep to that tradition. It seems very likely that the case will progress to the Supreme Court -- which has shown itself to be politically flexible. End Comment.
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